ORIGINAL

Supreme Court Cause No. DA 09-0500

IN THE SUPREME COURT OF THE STATE OF MONTANA

Guy W. Rogers
Matthew I. Tourtlotte
Attorneys for Defendant/Cross Appellant
315 N. 24th Street
Billings, MT 59103
(406) 248-2611
grogers@brownfirm.com

Lon Peterson,
Appellant/Cross Appellee,

vs.

St. Paul Fire & Marine,
Insurance Company,
Appellee/Cross- Appellant.

MOTION FOR CONSIDERATION OF ADDITIONAL AUTHORITY RE: APPELLANT'S ARGUMENT THAT DEFENSE COUNSEL SERVES AS THE AGENT OF INSURANCE COMPANY

St. Paul Fire & Marine, Insurance Company (St. Paul), the Appellee/Cross-Appellant in this pending appeal presents the following motion and additional authority for the Court's consideration regarding Appellant's (Peterson's) argument that William Gregoire was acting as the agent of St. Paul while he served as defense counsel for St. Paul's insured, Omimex Canada, Ltd., during the defense of the underlying *Peterson v. Omimex* lawsuit. Pursuant to the requirements of Rule 16, Mont. R. App. P., Peterson's counsel has been contacted regarding the filing of this Motion. Peterson's counsel objects to the filing of this Motion.

SUMMARY DISCUSSION:

The purpose of this Motion is to direct the Court's attention to additional authority supporting St. Paul's position and the conclusion of the district court, that defense counsel, Mr. William Gregoire, was not acting as St. Paul's agent when he undertook the defense of St. Paul's insured, Omimex, during the litigation of the underlying case, *Peterson v. Omimex*. The statement of the law set forth in this Court's *In Re Rules* decision, together with the Formal Ethics Opinion No. 040809, interpreting the Court's decision, make it clear that Mr. Gregoire's duty of loyalty was absolute and undivided toward his client Omimex. As such, Mr. Gregoire, by definition, could not loyally serve the interests of St. Paul as its agent.

ARGUMENT:

During the April 21st oral argument of this matter, Peterson's counsel argued to the Court that St. Paul, in taking the position that it had no ability to direct or control Mr. Gregoire's defense of the underlying case, also took the position that it could avoid its obligations under the UTPA, including the duties to properly evaluate and settle the case. Contrary to Peterson's argument, St. Paul never took such a position. In fact, the transcript of the trial proceedings clearly supports the opposite conclusion.

While explaining the relationship between it and Mr. Gregoire to the jury, St. Paul clearly explained that even though Gregoire was in control of his client's

defense, St. Paul always retained the power and responsibility to settle the case, if liability had become reasonably clear:

> ***Q.(By Mr. Rogers) Now, when you work with Montana defense counsel, what is the custom and practice in St. Paul as to who controls that defense?***
>
> *A. (By Dale Reed) Well, the defense is going to be controlled by counsel. We hopefully will get reports, and we hopefully will know what's going on, but we do not control the defense, no...I can make suggestions...but I cannot -- if he determines that he needs to do something that's in the best interests of our insured, I cannot veto that... (TR3:680-681).*
>
> ...
>
> ***Q. (By Mr. Jackson) Right. Well, St. Paul had the authority to settle the claim for a certain amount of money?... You had the control over the settlement and the ultimate resolution of the claim, correct?***
>
> *A. Yes.*
>
> ***Q. And you were getting reports from Mr. Gregoire, but St. Paul had authority and control over whether to settle or deny that claim, correct?***
>
> *A. The policy gives us that authority, yes, sir.* (TR3:708).

Contrary to the suggestions made in the April 21st oral argument, St. Paul was not hiding behind Gregoire during the bad faith trial, nor was it shirking its settlement duties upon him. St. Paul made it clear that if liability was reasonably clear, it had the authority and obligation to settle the case. The jury was fully instructed upon St. Paul's obligations under the UTPA. (Doc. # 131:Nos. 6 & 16). St. Paul's obligations to investigate and evaluate the claim could not be delegated to Gregoire

and continued through the resolution of the underlying claim. *Palmer v. Farmers Ins.* (Mont. 1993) 861 P.2d 895.

St. Paul's settlement obligations, as disclosed to the jury, belie the asserted importance Peterson's counsel have placed upon the issue of whether or not Mr. Gregoire was acting as St. Paul's agent when he defended Omimex. If Mr. Gregoire had been acting as St. Paul's agent, as suggested by Peterson, then by definition he would have owed duties of good faith and loyalty to St. Paul. *See, First Nat. Bank of Twin Bridges v. Sant* (Mont. 1973), 161 Mont. 376, 382, 506 P.2d 835, 839 (Citing, 3 C.J.S. Agency §138); *See, State v. Frederick* (Mont. 1984), 208 Mont. 112, 118, 676 P.2d 213, 216. Such a position in incongruous with Montana's laws and the ethical obligations placed upon defense counsel.

Formal Ethics Opinion No. 040809 recognizes that defense counsel in Montana cannot meet their ethical obligations to their clients by owing a separate duty of loyalty to the insurer. While the Opinion was not referenced in prior briefing, it is extremely important for the Court's consideration of this important issue. *See, Formal Opinion No. 040809, Supplement, p. 1, Exhibit A.* The Ethics Committee, citing this Court's decision in *In Re Rules*, characterizes defense counsel's duty of loyalty as being absolute and undivided. The Committee further emphasized that defense counsel's sole client is the insured. *Id.* Provided these duties, Gregoire certainly could not have had an obligation to act in the furtherance

of St. Paul's interests while defending Omimex in the underlying case.

Furthermore, Peterson's argument neglects the fact that the trial record clearly shows the accident in question involved disputed liability facts (TR4: 917-918). With Omimex faced with a demand in excess of its policy limits (TR4:859), Gregoire had an absolute duty of loyalty to litigate the contested facts through trial (if necessary) and attempt to gain a favorable resolution for his client. The body of evidence placed before the jury during the course of the bad faith trial supports that Gregoire diligently served the interests of Omimex. The record also shows that St. Paul was disputing Omimex's liability based upon the evidence suggesting that Peterson was driving on the wrong side of the road (TR2: 481-484).

Unlike the *Jessen v. O'Daniel* and *Safeco v. Ellinghouse* authority advanced by Peterson in favor of his 'agency' argument, Mr. Gregoire did not act improperly or unethically in undertaking the defense of Omimex. Moreover, Gregoire cannot be faulted for refusing to settle the *Peterson v. Omimex* case because even though he controlled the defense, the duty and obligation to settle the case (if liability was reasonably clear) always rested with St. Paul (TR3:708).

CONCLUSION:

Formal Ethics Opinion No. 040809 emphasizes that post *In Re Rules*, it is absolutely clear that the insured is the sole client of defense counsel. Additionally the Committee recognizes that defense counsel owes the insured an undivided duty

of loyalty. Recognizing Mr. Gregoire as St. Paul's agent, under the facts of the present case, would serve to muddy these waters and would call into question how defense counsel can satisfy an undivided duty of loyalty to their client, while also owing a duty of loyalty to further the interests of the client's insurer. Peterson's agency argument should be rejected.

Dated this 29 day of April, 2010.

Matthew I. Touttotte
Attorney for Appelle/Cross-Appellant
St. Paul Fire & Marine Insurance Company

CERTIFICATE OF COMPLIANCE

Pursuant to Rules 16 and 27 of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced and the word count is less than 1,250 words, excluding the Certificate of Service and this Certificate of Compliance.

CERTIFICATE OF SERVICE

I hereby certify that I have filed a true and accurate copy of the foregoing MOTION with the Clerk of the Montana Supreme Court; and that I have served true and accurate copies of the foregoing MOTION upon each of the following:

Alexander (Zander) Blewett, III
Kurt M. Jackson
HOYT & BLEWETT PLLC
P. O. Box 2807
Great Falls, MT 59403-2807

Dated this 29 day of April, 2010.

Matthew I. Tourtlotte
Attorney for Appelle/Cross-Appellant
St. Paul Fire & Marine Insurance Company

EXHIBIT A

ETHICS OPINION 040809

FACTS:

Attorney is submitting a series of questions about the written consent requirements within Montana's new Rules of Professional Conduct, effective April 1, 2004. Several of the questions implicate the Montana Supreme Court's opinion In re Matter of the Rules of Professional Conduct and Insurer Imposed Billing Rules and Procedures, 299 Mont. 321, 2 P.2d 3d 806 (2000), where the Court held that under the Rules of Professional Conduct, the insured is the sole client of defense counsel.

QUESTIONS PRESENTED:

1. Is an attorney retained by an insurer to defend its insured required to obtain written informed consent under Rule 1.8(f) from the insured client?

2. Is an attorney retained by an insurer to defend its insured required to comply with Rule 1.5(b):
   a. including communicating with the insured client in writing, before or within a reasonable time after commencing the representation, to explain the scope of the attorney's representation of the insured even though this is most often now being accomplished by the insurer?
   b. Inform the insured the rate of the attorney's fee to the insurer for representing the insured?
   c. Inform the insured client that the insured has no responsibility for paying the retained attorney's fee and expenses?

3. Is a court-appointed public defender attorney obligated under Rule 1.5(b) and Rule 1.8(f) to:
   a. obtain written informed consent from the indigent defendant about the public payment for the representation?
   b. Inform the indigent defendant, in writing, before or within a reasonable time after commencing the representation, about the scope of the attorney's representation of the defendant client?
   c. Inform the indigent defendant about the rate of the attorney's fee or that the defendant has no responsibility for paying that attorney's fee or expenses unless there is a requirement of reimbursement imposed by the court?

4. Must the consents required in the above questions be obtained or the communication to the insured/indigent defendant be given in matters in progress before the April 1, 2004 effective date of the Rules?

SHORT ANSWER:

1. Yes.
2. a. Yes.
   b. Yes.
   c. Yes.
3. a. Yes.
   b. Yes.
   c. Yes.
4. Yes, it is prudent practice to make this effort.

DISCUSSION:

The attorney's inquiries highlight a deliberate departure in the new Montana Rules of Professional Conduct from the ABA Model Rules, requiring some form of writing to confirm a clients' understanding of the scope and terms of the attorney-client relationship. The Montana departures from the Model Rules are noted in italics here:

> Rule 1.8 Conflict of Interest: Current Clients: Specific Rules
> (f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
> (1) the client gives *written* informed consent;
> (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship;
> (3) and information relating to representation of a client is protected as required by Rule 1.6.
>
> Rule 1.5: Fees
> (b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated *in writing. This paragraph does not apply in any matter in which it is reasonably foreseeable that total cost to a client, including attorney fees, will be $500 or less.*

Several of the phrases and words used in these Rules are included in Rule 1.0: Terminology. These and their definitions include:

> (g) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about

the material risks of and reasonably available alternatives to the proposed course of conduct.

(p) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, Photostatting, photography, audio or video recording and e-mail. A "signed" writing includes the electronic equivalent of a signature, such as an electronic sound, symbol or process which is attached to a writing and executed or adopted by a person with the intent to sign the writing.

A defined phrase not used in the portions of the Rules cited, but relevant to the inquiry, is "confirmed in writing." This means:

> (d) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (g) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

Before submitting the proposed Rules to the Court, the Ethics Committee made a deliberate decision in several instances to include a writing requirement beyond that offered in the Model Rules. Consistent with the Model Rules, the Committee suggested replacing the phrase "consent after consultation" with "informed consent." The point of the changes was to pay particular attention to the client's level of understanding about the decision at the time it is made. Whatever the client's level of understanding about a decision, the Rules require that those decisions be documented by the lawyer not at all or in one of two ways: confirmation in writing by the lawyer or confirmation in a writing signed by the client.

It is notable that the requirement that an agreement be confirmed in writing does not mandate a client signature. Explaining the range of the writing requirement, Donald Lundberg, the Executive Secretary of the Indian Supreme Court Disciplinary Commission, wrote in an article appearing in The Professional Lawyer, titled "Documenting Client Decisions: A Critique of the Model Rules Post-Ethics 2000"[1]:

[1] Volume 14, Issue No. 4 (2004).

> At the lowest range of formality, a confirmation in writing may be as simple as an e-mail message from the lawyer to the client or, arguably, even a message left by the lawyer on the client's voicemail ("audio recording" in 1.0 (p)). Because the definition of a writing is so broad, it would be arguably sufficient if the lawyer telephoned a client's administrative assistant and requested that a message be written down and given to the client. At bottom, the minimum documentation requirements for confirmation in writing are not demanding, but more significantly, they cast the client in the purely passive role of being a recipient.

Mr. Lundberg's explanation of the heightened requirement is helpful in understanding the Ethics Committee's recommendation of that standard:

> The enhanced duty to memorialize some decisions in the form of a writing signed by the client adds a new element to documentation of client decisions—it calls for the client to play an active role in the documentation process. Just as the requirement imposed upon the lawyer to confirm certain client decisions in writing is not onerous, the active participation by the client called for by the requirement of a writing signed by the client imposes very little burden on either lawyer or client. As explained above, the definition of a writing is very expansive and incorporates recent advances in the technology of communication. And the signature requirement is satisfied by virtually any reliable means of authenticating that the writing was made or adopted by the client.

Mr. Lundberg further explains:

> It comes down to whether such client decisions are sufficiently important that, at a documentation level, some overt act of assent by the client ought to be required. If nothing else, the requirement that the client take an affirmative step is one more safeguard to assure that the client is making a conscious decision under circumstances where the consequences of the decision might ultimately be to the client's disadvantage.
> ***
> ...[T]he client is well served because the client is compelled to actively participate in the documentation process in cases where the interests of others are at play, thereby impressing upon the client the importance of the decision. All client decisions made during the course of a legal representation are important, but the lawyer's duty to be assured that a client's consent is voluntary and fully informed should be calibrated to correspond to the gravity of the decision. A client's willingness or unwillingness to sign a consent is an important gauge of the client's appreciation of the

importance of the rights being given up [or given]. The lawyer is equally well served by having a sound and irrefutable foundation of client consent to support going forward with an agreed course of action. Having the client's signed consent in the file is a prudent, self-protective step that in no way conflicts with the rights of the client.

Communication with a client to the extent emphasized in the attorney's inquiry is helpful overall to the client, and potentially may also be helpful if not vital for the attorney. Particularly in the case of an insured, a clarification of the respective roles of insurer and insured and a statement of the scope of the representation, and who is paying what amount for the service, provides the client refreshingly direct information. For those practicing largely in this area, a standardized form explanation should serve to address this requirement simply and easily.

In the case of indigent defendants relying upon court appointed public defenders, the burden is insubstantial. Indigent defendants must typically complete an indigency questionnaire and specifically request representation. The request is either approved or disapproved by the Court before whom the defendant appears. If the attorney-client relationship breaks down, the Court makes the decision about replacement counsel. The Committee believes a heightened understanding by defendants of the scope, terms and fees involved for the representation benefits the system overall. This is particularly the case with the indigent defendant, who often has the peculiar notion that a court appointed attorney will be somehow less likely to give their all for the client because the client isn't paying the bill. Understanding from the first office meeting that the court appointed attorney's first loyalty is to the defendant should help assuage these concerns and heighten the stability of the relationship, at least as to this point.

We believe that in both instances such informed consent or participation may tend to re-assure the client that the lawyer who may have been selected by the insurer or the Court has the duty of absolute loyalty to the client.

Finally, as to the question about an effective date for the Montana Rules adopted April 1, 2004: It is not in this Committee's purview to establish whether the new Rules are retroactive. The retroactive application of these Rules is an issue that will ultimately be decided by the Montana Supreme Court. However, we note that in many cases the requirement of obtaining informed consent is simply a clarification of the attorney's obligation to obtain "consent after consultation." We also note that a portion of the writing requirement of Rule 1.5(b) was part of the

original language of the Rule, prior to the Rule's amendment. The writing requirement is not new. We recommend that lawyers who have not already communicated in writing with their clients about the scope, terms and fees involved in the particular representation consider making this effort. As was noted above, this could be as simple as a letter or phone message confirming the prior nature of the relationship and that this arrangement should continue as it has previously.

CONCLUSION:

It is the Committee's opinion that the writing and informed consent requirements of the new Rules are not overly burdensome. Rather, these simple requirements contribute to enhanced communications with clients about the scope, terms and fees involved for the representation. These requirements also solidify for the client the nature of the attorney's loyalty. Clients are more likely to work with their attorney when they know that the attorney's duty and responsibility lies with the person being represented, and not to the person or entity paying the bill.

THIS OPINION IS ADVISORY ONLY

Supreme Court of Montana.
Glenn W. GREY, Plaintiff and Appellant,
v.
SILVER BOW COUNTY, a body politic, Defendant and Respondent.
No. 11150.

March 15, 1967.
Rehearing Denied April 24, 1967.

Patient's action against county hospital for negligence. The District Court of the Second Judicial District, Silver Bow County, James D. Freebourn, J., entered summary judgment dismissing complaint on ground that it was barred by statute of limitations and the patient appealed. The Supreme Court, James T. Harrison, C. J., held that discovery doctrine would be applied to extend period of statute of limitations about 57 days in patient's action for negligence which allegedly caused introduction of infection at site of surgery, a condition not discovered by patient who had been placed in a cast which covered site of surgery until patient went to another physician some 57 days after operation.

Reversed.

West Headnotes

[1] Limitation of Actions 241 ⇐1

241 Limitation of Actions
241I Statutes of Limitation
241I(A) Nature, Validity, and Construction in General
241k1 k. Nature of Statutory Limitation. Most Cited Cases
One reason for statute of limitations is to protect defendant from having to defend against claims that are stale.

[2] Limitation of Actions 241 ⇐95(10.1)

241 Limitation of Actions
241II Computation of Period of Limitation
241II(F) Ignorance, Mistake, Trust, Fraud, and Concealment or Discovery of Cause of Action
241k95 Ignorance of Cause of Action
241k95(10) Professional Negligence or Malpractice
241k95(10.1) k. In General. Most Cited Cases
(Formerly 241k95(10), 241k95(1))
Applicability of discovery doctrine to malpractice action is itself subject to some restraint as the time from occurrence of malpractice grows greater, and in such circumstances considerations of fairness to defendant underlying statutes of limitations become more insistent while plaintiff's appeals to equity implicit in discovery doctrine become less so.

[3] Limitation of Actions 241 ⇐95(12)

241 Limitation of Actions
241II Computation of Period of Limitation
241II(F) Ignorance, Mistake, Trust, Fraud, and Concealment or Discovery of Cause of Action
241k95 Ignorance of Cause of Action
241k95(10) Professional Negligence or Malpractice
241k95(12) k. Health Care Professionals in General. Most Cited Cases
(Formerly 241k95(1))
Discovery doctrine would be applied to extend 3-year period of statute of limitations about 57 days in patient's action against county hospital for negligence which allegedly caused introduction of infection at site of surgery, a condition not discovered by patient who was placed in a cast which covered site of surgery until patient went to another physician some 57 days after operation.

[4] Time 378 ⇐10(4)

378 Time
378k7 Days
378k10 Sunday or Other Nonjudicial Day

378k10(4) k. Limitation of Actions. Most Cited Cases
Complaint in action governed by three-year statute of limitations was timely where it was filed three years and one day after statute began to run, where day before it was filed was a Sunday. M.R.Civ.P. rule 6(a).

***214 **819** H. L. McChesney (argued), Missoula, for appellant.

Poore, Poore, McKenzie & Roth, Butte, Allen R. McKenzie (argued), Butte, for respondent.

JAMES T. HARRISON, Chief Justice.

This is an appeal by the plaintiff from a summary judgment entered in favor of defendant. The summary judgment dismissed plaintiff's action upon the grounds that it had not been filed within the statute of limitations.

The plaintiff-appellant is Glenn W. Grey and will be referred to as plaintiff. The defendant-respondent is Silver Bow County, and will be referred to as defendant.

The plaintiff makes three specifications of error which raise the issue of whether the district court was correct in holding that plaintiff's action was barred by the statute of limitations.

The record before this court reveals the following facts: On August 23, 1961, plaintiff underwent surgery to his left hip at the Silver Bow General Hospital, a hospital owned, operated, and maintained by defendant and situated in Butte, Montana. Plaintiff's surgery was necessitated by a fracture which had occurred in a mine accident in Philipsburg, Montana. Following surgery, a hip length cast was applied to plaintiff's leg. The cast covered the site of the surgery. Plaintiff was discharged from the Silver Bow General Hospital****820** on September 21, 1961. He returned to his home in Philipsburg.

On October 18, 1961, plaintiff sought medical treatment from Dr. Cunningham, a Philipsburg physician, and Dr. Cunningham cut a window in the cast at the site of the surgical intervention. ***215** Dr. Cunningham found an infection which was subsequently diagnosed as staphylococcus infection.

Plaintiff's complaint was filed on October 19, 1964. After pre-trial discovery procedures had been employed by both sides, plaintiff filed an amended complaint on June 9, 1965, which alleged that the infection was introduced into plaintiff's body because proper sterile techniques were not employed by defendant's hospital; that the infection was introduced on August 23, 1961, the day of the surgery; and that the infection was not discovered until October 18, 1961.

In granting the motion for summary judgment made by defendant, the district court found that plaintiff did not know of the infection until October 18, 1961. The district court was of the further opinion that the action could have been filed at any time within three years of plaintiff's discharge from the hospital. However, the action was not so filed but was filed within three years of the date plaintiff discovered the infection. The district court held that it was barred by the statute of limitations.

The plaintiff contends that the statute of limitations should begin to run in this case from the date plaintiff discovered the infection, namely, October 18, 1961, while, on the other hand, defendant contends the statute of limitations should begin to run from the date of the alleged negligence, namely, August 23, 1961.

In substance, plaintiff asks this court to apply the so called 'discovery doctrine' to the facts of this case. The 'discovery doctrine' has been thoroughly explained, praised, and criticized in opinions of courts of other jurisdictions. In Billings v. Sisters of Mercy of Idaho, 86 Idaho 485, 389 P.2d 224, 232, the Supreme Court of Idaho made a thorough discussion of the 'discovery doctrine' and states the doctrine in this manner: 'Where a foreign object is negligently left in a patient's body by a surgeon and

SUPPLEMENT TO FORMAL OPINION NO. 040809

The Ethics Committee of the State Bar of Montana has been asked to modify or provide further guidance as to its Formal Opinion No. 040809. In particular, the Committee has been asked whether insurance counsel is required by Rule 1.5(b) M.R.P.C. to inform its client, **the insured**, of the basis of its fee arrangement with the insurer. Simply stated, the query is made as to whether the opinion is correct in stating that the attorney must provide this information to its client when the client is not responsible for paying that fee.

The Ethics Committee unanimously believes that even when the insurer is responsible for payment of all fees and expenses of litigation, the attorney is ethically responsible to inform its client of the terms of its fee agreement with the insurer. The Committee can conceive of no legitimate purpose for not doing so. Its view is that the Montana Supreme Court in *In the Matter of the Rules of Professional Conduct and Insurer Imposed Billing Rules and Procedures,* 299 Mont. 321, 2 P.3d 806 (2000) made it absolutely clear that **the insured** is the sole client of insurance defense counsel; the insurer is not a co-client. Further, while the insurer may be writing the check, ultimately the fees are being paid by the premiums paid by **the insured**. In addition, the fees charged by the attorney may have a direct impact on whether or not the insurance policy is renewed.

The core ethical principle at work here is that the attorney-client relationship is a fiduciary relationship wherein the attorney owes a duty of absolute loyalty to the client. Keeping the issue of the fee arrangement away from the client does not serve this core principle.

The second question presented is whether the "written informed consent" required by Rule 1.8(f) M.R.P.C. requires that the writing be signed by the client. It does not. However, in

order for the client to be "informed" the writing must clearly advise the client of his or her rights with respect to the hiring of counsel and must inform the client that if he or she disagrees with the designation of counsel, the client should notify counsel in writing within a specified time period.

The Committee believes that the better practice, in all but emergency situations, is to have the consent signed by the client.

This opinion is advisory only.